

In the Matter of Merchant Mariner's Document No. Z-803029-D3
Issued to: JOHN HERINDA

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

430

JOHN HERINDA

This appeal comes before me by virtue of Title 46 United States Code 239(g) and 46 Code of Federal Regulations Sec. 137.11-1.

On 10 January 1950, an Examiner of the United States Coast Guard at New York City, revoked Merchant Mariner's Document No. Z-803029-D3 issued to John Herinda upon finding him guilty of "misconduct" based upon three specifications alleging in substance, that while serving as ordinary seaman on board the American S.S. FREDERICK BOUCHARD, under authority of the document above described, on or about 20 August, 1949, while said vessel was at sea, he did wrongfully:

First Specification: * * * *fail to perform all of his assigned duties;

Second Specification: * * * *threaten crew members with a dangerous weapon, a fire axe; and

Third Specification: * * * *damage the vessel's radio room and the appurtenances and apparatus therein with a fire axe.

At the hearing, Appellant was given a full explanation of the nature of the proceedings and the possible consequences. He was represented by counsel of his own selection and entered a plea of "not guilty" to the charge and each specification.

Thereupon, the Investigating Officer made his opening statement and introduced in evidence sworn statements taken during the Coast Guard investigation at Bremerhaven, Germany. By stipulation with Appellant's counsel, these statements were received in evidence.

In defense, Appellant offered in evidence the testimony of one crew member, his own sworn testimony and several statements made by other members of the crew. The latter were admitted since there was no objection raised by the Investigating Officer.

At the conclusion of the hearing, having heard the statements of the Investigating Officer and Appellant, the Examiner found the charge "proved" by proof of specifications No. 1, 2 and 3, and entered an order revoking Appellant's Merchant Mariner's Document No. Z-803029-D3 and all other valid licenses, certificates and documents issued to him by the United States Coast Guard.

From that order, this appeal has been taken, and it is urged that the evidence proves that Appellant was delirious, ill and mentally unbalanced and therefore, he was not responsible for his actions. For this reason, it is contended that Appellant could not have been guilty of wrongful misconduct and the Master was negligent for not confining Appellant when he knew about Appellant's condition.

APPEARANCES: Samuel Segal,
of New York City

Based upon my examination of the Record submitted, I hereby make the following

FINDINGS OF FACT

On 20 August, 1949, Appellant was serving as an ordinary seaman on board the American S.S. FREDERICK BOUCHARD, under authority of his Merchant Mariner's Document No. Z-803029-D3, while the ship was enroute from Baltimore, Maryland, to Brake, Germany.

On this date, the ship had been at sea approximately seven days. Until the 19th of August, Appellant had been doing his work satisfactorily and standing his 12-to 4 watches regularly. When he was called for the 12 to 4 watch on the morning of the 19th, Appellant acted peculiarly so the boatswain was called to take his watch. Appellant was saying queer things, imagining that he saw people and hearing voices. Later in the day, he told other members of the crew that some men were after him and intended to kill him. At some times, he did not seem to recognize his fellow shipmates and the men noticed that he was mumbling to himself. Appellant's unusual actions were reported to the chief mate and to the Master but the latter did not take any steps to confine Appellant.

When Appellant was called for the 12 to 4 watch on the morning of 20 August, 1949, he immediately got out of his bunk and started running around the ship dressed only in his shorts. He then got back in his bunk and, again, the boatswain was called to stand his watch.

At about 0045 on 20 August, 1949, two members of the crew, who were sleeping in the spare cabin on the bridge, were awakened when a fire axe wielded by Appellant crashed through the door of the cabin. Appellant told the two men that he was coming in to get them but he did not do so.

Appellant took the fire axe to the radio room which was nearby and stated that he would wreck the radio equipment and kill anybody entering the radio room unless he was given a bottle of whiskey. The Master and members of the crew tried to reason with him and he took a swing at the boatswain with the fire axe. The Master finally agreed to give him a bottle of whiskey if he would put the axe away and not damage the radio equipment. After Appellant promised to do this, a "fifth" of whiskey was placed on the floor inside the door to the radio room. Appellant then locked the door from the inside and several minutes later demanded another bottle of whiskey.

When this demand was not complied with, Appellant began to smash the radio equipment with the fire axe. He did considerable damage to the intermediate frequency transmitter, the high frequency transmitter and the high frequency receiver. The Master attempted to scare Appellant into stopping by firing his revolver through the vent at the bottom of the door to the radio room. Since this did not influence Appellant, the Master handed the gun to the chief mate who fired two more warning shots while looking through the vent in the door. At the same time, he ordered Appellant to drop the fire axe. Appellant continued to swing the axe at the equipment, so the chief mate shot him through the upper part of his left leg. Appellant laughed, jumped up on the desk so as to be out of the gun's range and commenced swinging the axe at the high frequency set. The chief mate ran around into the wheelhouse and fired another shot while aiming through the air vent between the wheelhouse and the radio room. This shot grazed Appellant's right thumb and went through his left hand. Appellant dropped the axe and was taken below to the hospital on a stretcher. He was given first aid treatment and then handcuffed to the bunk in which he was lying.

Appellant was taken to the hospital at Brake, Germany, when the ship arrived at that port. He remained in the hospital about nine days and later returned to the United States as a patient on board the U.S.A.T. COMFORT. He received further treatment at the Staten Island Marine Hospital. An examination at that hospital indicated that there was no necessity to treat Appellant for any psychiatric condition. Appellant stated that he had never been sick or hospitalized before in his life and that he could remember nothing that happened on 20 August, 1949, up to the time he was in the ship's hospital handcuffed to the bunk.

There is no record of any prior disciplinary action having been taken against Appellant during the four years he has been going to sea. He is about thirty years old and is single.

OPINION

Appellant has set up the affirmative defense that he was completely out of his head when he committed the alleged acts of misconduct and, therefore, his conduct was not "wrongful". He states that the evidence supports this position and the fact that the operators of the FREDERICK BOUCHARD settled Appellant's action against them for a substantial sum of money is significant as to the negligence of the Master in failing to guard Appellant when he was ill and unable to protect himself. But whether the Master's failure to confine Appellant was negligent is not conclusive as to Appellant's liability in such a remedial proceeding as this. The statutory duty imposed upon the Coast Guard is to take such action as is necessary to protect lives and property at sea. In line with this obligation, a seaman's destructive conduct while at sea is considered to be "wrongful" unless he had clearly proven that his actions did not result through any fault of his own.

In this case, it is admitted that Appellant committed the acts alleged in the three specifications. Hence, a prima facie case of "wrongful misconduct" was made out against him and to refute this he is required to submit affirmative proof as to what caused his mental illness and delirious condition. In my opinion, he has failed to satisfactorily assume this burden. Appellant claims that his delirious state might have been caused by poisons, exhaustion, chronic illness, high fever, or injury, as well as by alcohol. Although Appellant attacks the finding of the Examiner to

the effect that Appellant was suffering from delirium tremens caused by alcohol, he has failed to submit any evidence to support his position as to which of these other causes induced Appellant's delirious condition. Having failed in this respect, Appellant has not refuted the prima facie case made out by the acts admittedly committed by him.

The case of The Iroquois (1904), 194 U.S. 240, cited by Appellant, concerns the Master's obligation to put into port when a seaman has been seriously injured while the ship is at sea. Other than the general statement that the Master is required to protect the health of the seamen under his command, it has no bearing on this case. This duty of the Master is well known but, as mentioned above, the failure of the Master to take proper action does not relieve Appellant of responsibility for his own actions.

The other case mentioned by Appellant, Reck v. Pacific-Atlantic S.S. Co. (C.C.A., N.Y., 1950), 180 F. 2d 866, pertains primarily to whether a seaman's injury resulted from negligence in permitting a delirious seaman to go unguarded. In addition to stating that the jury was justified in choosing between two possible causes of the injury, the court also stated that when there was no direct evidence as to which of these possibilities had occurred the jury's verdict would not be reversed on appeal; and the court went on to cite Lavender v. Kurn (1946), 327 U.S. 645, as follows:

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference."

In the latter case, the Court held that the Appellate court had no right "to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury". And this same rule is applicable with respect to the findings and conclusions of the Examiner in this case.

CONCLUSION

In view of the finding that Appellant's condition was self-induced, his actions were the result of his own misconduct; and, since such conduct is a grave threat to the safety of life and property at sea, the order imposed by the Examiner is not considered to be unduly harsh and it must be sustained.

ORDER

The Order of the Examiner dated 10 January, 1950, should be, and it is, AFFIRMED.

Merlin O'Neill
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D.C., this 15th day of August, 1950.